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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION THREE

OLUMIDE KOLAWOLE OBAYEMI,

Petitioner,

v.

THE SUPERIOR COURT OF ALAMEDA
COUNTY,

Respondent;

OLUKEMI BOLANLE OBAYEMI,

Real Party in Interest.

A136517

(Alameda County
Super. Ct. No. HF 11583683)

Petitioner Olumide Kolawole Obayemi, father of two minor children, is a litigant in a marital dissolution proceeding. Real party in interest Olukemi Bolanle Obayemi is his former spouse. Petitioner filed this writ petition challenging an August 9, 2012 order modifying child and spousal support, on the grounds that: (1) the family law judge was biased against him; (2) the court, in part, based its order on an inaccurate assessment of petitioner's income; (3) the court based its order, in part, on an inaccurate assessment of real party Olukemi Bolanle Obayemi's income; (4) the court based its order, in part, on an inaccurate assessment of the health insurance costs paid by petitioner; and (5) the court failed to include in its calculations childcare costs related to petitioner's employment.

Petitioner filed his pro se petition for writ of mandate, mandamus, review, supersedeas, prohibition, certiorari, error coram nobis and/or error coram vobis or other

extraordinary relief on September 13, 2012. On October 1, 2012, via counsel, he sought leave to file an amended petition. We grant petitioner's motion to file an amended petition, and will construe it as a petition for writ of mandate. We summarily deny petitioner's claim that the court was biased against him and that Commissioner Hendrickson should be recused. We also deny petitioner's requests for judicial notice because (1) petitioner has not established that the documents he wishes us to notice were part of the trial court record and (2) his second request seeks to have us take judicial notice of an irrelevant document.

On January 11, 2011, the family court ordered petitioner to pay real party \$801 consisting of \$754 per month for the support of his two minor children, and \$47 per month as spousal support. On May 15, 2012, the family court heard petitioner's motion to modify his support obligation. He claimed that he was entitled to support from real party, whom he alleged earned \$8,468 per month. Rather than ordering real party to pay petitioner child support, on August 9, 2012, the court increased petitioner's child support payments to \$820 per month, and his spousal support payments to \$131 per month, both effective as of April 1, 2012. Thus, his total monthly support obligation was increased by \$150 to \$951.

On September 13, 2012, petitioner filed his pro se petition in this court challenging the August 9 order; on October 1, his counsel moved for leave to file an amended petition. On October 4, 2012, we requested that real party file an opposition on or before October 15, 2012 and gave notice, pursuant to *Palma v. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171 that, if warranted, we could issue a peremptory writ in the first instance. Real party did not file an opposition. For the reasons explained below, we now issue a peremptory writ directing the Superior Court to vacate its August 9, 2012 order, and to hold further hearings consistent with this opinion.

DISCUSSION

A. WRIT RELIEF IS APPROPRIATE IN THIS CASE.

Petitioner incorrectly asserts that he has no direct right of appeal from the Superior court's order. An order modifying support is appealable. (Fam. Code, § 3554; Code Civ. Proc., § 904.1, subd. (a)(10); *In re Marriage of Skelley* (1976) 18 Cal.3d 365, 367; *County of Los Angeles v. Patrick* (1992) 11 Cal.App.4th 1246, 1250.) Nonetheless, because of the hardship the increased monthly support payments will impose on petitioner due to his limited income and petitioner's clear entitlement to relief, we resolve this matter through the accelerated *Palma* procedure.

Our review is subject to an abuse of discretion standard. (*County of Orange v. Smith* (2005) 132 Cal.App.4th 1434, 1445). However, the determination of support is a highly regulated area and the trial court's discretion is proscribed by statute. (*Ibid.*)

B. THE SUPERIOR COURT SHOULD HAVE GIVEN EVIDENTIARY CONSIDERATION TO PETITIONER'S CURRENT INCOME AS REPORTED ON HIS INCOME TAX RETURN EVEN THOUGH HE IS SELF-EMPLOYED.

Before the trial court, petitioner claimed that his income has decreased because of a fire at his office and disparagement due to the allegations real party made against him in the family court proceedings. The court discounted petitioner's claims because his allegations were unsupported and not adequately explained. However, petitioner did submit his tax return as evidence of his actual income. Because petitioner is self-employed, the trial court disregarded his tax return as evidence of his earnings, presumably because of the potential for self-employed individuals to minimize their income reported on tax returns.

Real party contended that petitioner's income had increased, not decreased, since the court's initial support order. There followed an off-the-record discussion, to which we are not privy. Based on the record provided, we cannot determine the basis for real party's claim. When the court's initial support order was entered, petitioner claimed a gross monthly income of \$4,136.

For purposes of calculating support payments, tax returns establish a rebuttable presumption of a party's income. (*County of Orange v. Smith, supra*, at p. 1446.) The fact that a party is self-employed is a factor to be weighed by the court when it determines whether the tax return is accurate. Thus, for example, in *Marriage of Calcaterra and Badakhsh* (2005) 132 Cal.App.4th 28, 34–36, the court discounted the father's report of profit or loss from his business as shown in his federal income tax returns. But in that case, there was evidence showing that father had submitted a loan application, showing significantly more income than reflected on his tax returns. Here, the court points to no such equivalent evidence that would lead it to question the amounts shown on petitioner's tax returns. On remand, the court shall accord petitioner a rebuttable presumption that his tax returns reflect his true income. Real party, of course, may present evidence seeking to rebut it.

C. THE COURT SHOULD CONSIDER EVIDENCE OF HEALTH INSURANCE EXPENSES PETITIONER INCURRED FOR HIS MINOR CHILDREN IN CALCULATING PETITIONER'S DISPOSABLE INCOME.

When a court orders a parent to pay health care costs for minor children, the amount the parent pays for health insurance is to be deducted from gross income when calculating the parent's disposable income. (Fam. Code, §§ 3753 & 4059, subd. (d).) Petitioner attempted to secure a deduction from the computation of his disposable income for his increased health insurance costs, but the court did not take those increased costs into account in its calculations. He also submitted evidence that he pays for dental insurance for his children, which also does not appear to have been deducted from his gross income. On remand, in calculating petitioner's disposable income, the court should deduct his actual expenses for health and dental insurance from his gross income, as demonstrated by admissible evidence.

D. PETITIONER MAKES AN INSUFFICIENT SHOWING THAT THE FAMILY COURT ABUSED ITS DISCRETION CONCERNING ALL OTHER ISSUES RAISED IN THE AMENDED PETITION.

Petitioner argues that three other errors affected the amount he has been ordered to pay as support. (1) The court failed to deduct his expenses for employment-related childcare when calculating his disposable income. (2) The court failed to allow petitioner a hardship deduction. (3) The court failed to accurately calculate real party's income because it's calculation did not include miscellaneous income she derived from the sale of books and her unemployment insurance benefits. Petitioner has not shown that the family court abused its discretion in any of these respects.

With regard to each of these assertions of error, the record demonstrates valid reasons supporting the family court's exercise of discretion. With respect to petitioner's employment-related childcare expenses, there was evidence before the court that, pursuant to a specific agreement between petitioner and real party, petitioner agreed to absorb his son's childcare expenses when he decided he would not enroll his son in public school, while real party agreed the couple's daughter would attend public school and secure free childcare in an after-school program. In other words, there was evidence that it was petitioner's decision to retain his son in private school where he would not have free or significantly cheaper schooling and childcare, so he bears the associated costs. Petitioner was not allowed costs for childcare incurred while he was working on Saturdays because real party is available to care for the children at those times.

A family court has discretion to "modify child support by allowing a deduction from the gross income of a parent experiencing hardship." (*In re Marriage of Paulin* (1996) 46 Cal.App.4th 1378, 1381.) Here, the court reasonably concluded that petitioner's hardship claim was unsubstantiated by admissible evidence. Thus, there is no basis to conclude that the family court abused its discretion by declining to make a hardship adjustment to petitioner's income.

Finally, with respect to petitioner's claim that the court incorrectly calculated real party's gross income, the court may have credited her contention that her miscellaneous

income was insignificant and erratic. Other than support payments, it appears that real party's only reliable monthly income is \$1,706, representing her earnings from two part-time jobs. These amounts appear to have been included when the court calculated her adjusted net income of \$2,024. Because we do not have complete records for real party's income, we cannot determine precisely how her monthly net income was calculated. Suffice it to say, we cannot conclude the court abused its discretion when it declined to consider real party's income from the sale of books that she claims was actually a loss and her unspecified unemployment benefits.

DISPOSITION

The accelerated *Palma* procedure is appropriate here because "petitioner's entitlement to relief is so obvious that no purpose could reasonably be served by plenary consideration of the issue" (see *Ng v. Superior Court* (1992) 4 Cal.4th 29, 35; *Lewis v. Superior Court* (1999) 19 Cal.4th 1232, 1236–1237 & 1240–1241), and in order to expedite the trial court's consideration of an appropriate support order in this case.

The superior court is directed to vacate its August 9, 2012 support order and to conduct a new hearing taking into account evidence of petitioner's income as reflected on his tax returns and his expenses for health and medical insurance. Any new support order shall take effect as of April 1, 2012. Petitioner shall be entitled to credits for overpayments, if any, which he made to real party based on any differences between the amounts he has paid based on the court's August 9 order and the amount of support established in any new order.

Siggins, J.

We concur:

McGuinness, P.J.

Jenkins, J.